

Practical Challenges

One Crucial Skill: Knowing How, When, and Why to Go into Caucus

By Kelly Browe Olson

In my mediation practice, I think a lot about caucusing. I don't, however, spend any time wondering whether to caucus; my thoughts are all about how and when to make a successful transition to private meetings with the parties I'm trying to help.

I train law students, graduate students, and lawyers through the mediation program at the William H. Bowen School of Law at the University of Arkansas at Little Rock. I also mediate and supervise mediations in adoption, child protection, elder guardianship, families in need of services, juvenile, never-married parents, and other custody, probate, and special-education cases. These cases typically involve a wide range of family members and the professionals they encounter through administrative processes.

Many of these parties seek mediation because they are unable to communicate or resolve their issues successfully on their own, and they need help reaching a resolution. Whether they will be co-parenting children, caring for an aging parent or relative with their siblings or a stepparent, working out family rules as parents and young adults, or working with court or school personnel to resolve conflicts involving their children, they will also need to interact effectively with one another in the future. One way to help these parties communicate and move toward collaborative solutions is to ask tough questions about their

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relationship, how they have been communicating in the past, what their role in the conflict has been, and how they would like to see decision-making happen in the future. Thinking about these questions — and answering truthfully — is usually easier for one party if the other is not in the room. If the parties spend the entire mediation in separate rooms, however, they will not learn anything about how to communicate with each other or make decisions collaboratively.

In the majority of these cases, I also need to check for issues of domestic abuse, other large power imbalances, and additional information that the parties can't or won't share when everyone is together. Caucuses provide a great opportunity to do this. Family members will frequently be more forthcoming about their own and the other party's (or parties') issues, strengths, and shortcomings in caucus. I also use caucuses to work with each party on issues that might be explosive or hard to bring up and give each party a chance to vent, to express frustration or anger without concern (the party's or mine) about this display shutting down subsequent conversation. Expressing anger can be helpful, but studies have shown that doing so in joint session can derail negotiations.¹

Caucuses can also help attorneys. Attorneys can use the mediator and these private meetings to discuss realistic potential outcomes with their clients when clients are unwilling or unable to hear their advice. I have spent a lot of time in caucus helping attorneys and other professionals by breaking down legalese or organizational acronyms into wording that clients can understand.

Mediators who do not caucus have a multitude of reasons. Time spent in caucus, these mediators note, is time that the parties are not directly communicating with each other. Even when the mediator's stated policy is not to reveal what is said in caucus,

the private conversations might change the way a mediator perceives the conflict or the party perceives the mediator. A party, for example, might think that the mediator is biased because of the amount of time he or she spent in caucus with the other party. These concerns can usually be overcome by letting the parties know the reasons for private meetings and the schedule, spending a similar amount of time with each party, and reiterating that caucuses have an extra layer of confidentiality. Other mediators do not want to stop the parties' progress toward agreement or do not want to play messenger between the parties. They want their parties, especially those whose relationships will continue, to spend all their time learning to communicate with each other. Caucusing, some mediators fear, may drive parties further apart or force them to rely on others (as they do on the mediator in those private meetings) to communicate.

These are all valid concerns, but I think it's important to use caucuses — at appropriate times and with appropriate language — to help parties learn how to talk about tough issues and how to handle their own disagreements. I train mediators to model effective communication and create opportunities for the parties to work with each other. Caucus is appropriate when the mediator senses that the parties have revealed all the relevant information, when the parties are going in circles, when the mediator wants to create a pause in fighting or yelling, when a private discussion on the effectiveness of negotiation tactics is warranted, or when a party needs a sounding board, someone to test words or ideas on before sharing them in the joint session. When my trainees start down a path of questions that may require a party to admit weakness or cause embarrassment or shame, I suggest they wait for caucus. I recommend that after discussing confidentiality at the start of caucus, they ask, "Is there anything you want to share that you couldn't say when we were all together?" Or perhaps, "I sensed that you wanted to say something in the conference session but didn't. If that's correct, will you share it now?"

Case Studies

This past semester I conducted three mediations in rapid succession: a post-divorce custody dispute, a workplace matter, and a special-education case. The similarities were striking. In all three disagreements,

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the parties lacked established boundaries, had a history of conflict avoidance, and said they wanted to work through their conflict and set a positive tone for future interactions. The spouse, the employee, and the school administrator were all furious or fed up with the other parties but had never confronted them about how their previous behavior had angered them, so the "other sides," the other spouse, the employer, and the parent, could not understand why they were so displeased.

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In the family case, in caucus, the spouse who remained in the family home was able to explain — and get my help choosing words to communicate later to her former husband — that while she appreciated help with household repairs, she did not think her former husband should have hired a friend to fix something at the house without talking to her first. In the workplace matter, in his caucus the employee talked about running the shop for years without interference or help from the owner — and then learning that the owner had hired a new manager. The employee was able to vent and strategize before returning to joint session and constructively sharing his frustration, describing how the shop was running before the new manager arrived, and talking about the new manager's impact on morale and profitability. The school administrator used her caucus to express

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exasperation over the fact that the parent in the case, who had older children with severe disabilities, expected the same level of intervention for a younger child with very different — and less severe — needs. She then tried out some analogies she wanted to use in talking with the parent. In those private meetings, the spouse, the employee, and the school administrator all saw that by failing to communicate effectively in previous discussions, they had helped contribute to the current misunderstandings.

The former husband, the boss, and the parent benefitted from their caucuses as well, talking about the past, examining their interactions, and coming to understand that they might have missed cues that could have prompted them to behave differently.

Back in joint session, while they didn't reach a mutual understanding about their past interactions or completely resolve all their issues, everyone in the three mediations was able to establish improved communication and map out strategies for the future.

There are other examples: In a never-married-parents case last month, I used caucus to question the father about the child's eating habits and allergies, a detailed discussion that I would never have had in joint session. In that private session, the father and I also talked candidly about the mother's need to control the unknown environment at the father's house. In caucus with the child's mother, I talked with her about her difficulty in giving the father control and asked how she would feel if he tried to control the child's time with her. In their separate caucuses, each parent was able to work through some concerns and create examples that helped them communicate much more effectively when we returned to the joint session.

In a recent elder guardianship case, I first helped squabbling siblings create a cohesive message about

their concerns about their father's care and then worked with their stepmother on her concerns about the siblings' interference with her husband's medical personnel. In the subsequent joint session, siblings and stepmother were able to communicate more productively and work out a joint plan to take to the health care professionals.

In all these cases, caucuses provided opportunities to ask hard questions, allowed the parties to vent without repercussion, allowed me to help them realize their role in the conflict, and let each party practice talking about what he or she really needed — things that would have been much harder, if not impossible, to accomplish in joint session.

Caucusing is an important tool, one that allows mediators and parties to delve deeper into parties' needs and interests and can help each party talk with the other at the table and in the future. As I said, for me, the question is not whether — but when and how — to use caucusing appropriately. I think mediators help their clients most when they thoughtfully consider numerous factors when choosing the time and circumstance for going into private session: Is emotion rising sky-high? Is one party withdrawing, maybe starting to speak but holding back? Is venting, that impressive expression of fear, anger, frustration, or remorse, threatening to derail the progress that both parties have worked so hard to make?

While the timing of their move to caucus may seem instinctive to experienced mediators, I bet they have subconsciously run through this list or a similar one. The effective mediator not only has great instincts and intuition, knowing when to stop the action with everyone present, but an impressive ability to find the right words to explain the break, encourage each party to talk without the other present, help parties find words to express their interests and needs, and get everyone back together. The result? A successful, empowering mediation that helps parties in ongoing relationships handle most of their future disputes all by themselves. ■



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Endnotes

- 1 Emma C. Fabiansson & Thomas F. Denson, *The Effects of Intrapersonal Anger & Its Regulation in Economic Bargaining* (2012), PLoS ONE 7(12): e51595. doi:10.1371/journal.pone.0051595, available at <http://journals.plos.org/plosone/article?id=10.1371/journal.pone.0051595#s1>.